

APPEAL NO. 031772
FILED AUGUST 25, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 10, 2003. The hearing officer resolved the disputed issues by deciding that: (1) the appellant/cross-respondent (carrier) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 and 409.022; (2) because the carrier has waived its right to contest the compensability of the claimed injury, the respondent/cross-appellant (claimant) sustained a compensable injury on _____; and (3) the claimant did not have disability from February 18, 2003, and continuing through the date of the CCH. The carrier appealed the hearing officer's waiver determination and attached to its appeal a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) and a copy of a receipt for the electronic transmission of the TWCC-21 dated February 20, 2003. The claimant appealed the hearing officer's injury and disability determinations and attached to this appeal medical documentation. The claimant and carrier each responded to the other party's appeal.

DECISION

Affirmed, as reformed.

CARRIER WAIVER

The carrier attached to its appeal a TWCC-21 and a copy of a receipt for the electronic transmission of the TWCC-21, both dated February 20, 2003, that purport to show that the carrier certified that benefits would be paid as they accrued in accordance with Section 409.021 and 409.022. Documents submitted for the first time on appeal are generally not considered, unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. To constitute "newly discovered evidence," the evidence must have come to the appellant's knowledge since the hearing; it must not have been due to a lack of diligence that it came to the appellant's knowledge no sooner; it must not be cumulative; and it must be so material that it would probably produce a different result upon a new hearing. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). After reviewing the documents attached to the appeal that were not in evidence at the hearing, we cannot agree that the documents meet the requirements for newly discovered evidence. The carrier did not show that the new evidence submitted for the first time on appeal could not have been obtained prior to the CCH. On its face the TWCC-21 was in the possession and control of the carrier on February 20, 2003. The evidence, therefore, does not meet the standard for newly discovered evidence and will not be considered.

This case turns on whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting an injury in accordance with Section

409.021 and the decision in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002). The TWCC-21 in evidence reflects that the carrier first received written notice of the claimed injury on February 19, 2003, and that the carrier contested compensability of the claimed injury on March 13, 2003. Section 409.021 provides that the insurance carrier is to begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission and the claimant of its refusal to pay benefits within seven days after receiving written notice of the injury (the "pay or dispute" provision). The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The hearing officer considered the evidence presented at the CCH and determined that the carrier waived the right to contest compensability according to Section 409.021. Nothing in our review of the record indicates that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer specifically found that the carrier waived the right to contest compensability of the claimed injury, however, we note that the hearing officer's Conclusion of Law No. 3 and the Decision contain an omission and we consider that omission to be a clerical oversight. Accordingly, we reform the hearing officer's Conclusion of Law No. 3 and the Decision to read as follows:

The Carrier has waived the right to contest compensability of the claimed injury by **not** timely contesting the injury in accordance with Texas Labor Code Section 409.021 and Section 409.022.

INJURY AND DISABILITY

The claimant submitted for the first time on appeal, medical documentation to show that the claimant sustained an injury on _____. The medical documents are dated after the CCH. The Appeals Panel generally will not consider evidence submitted for the first time on appeal. See Appeal No. 89311; Black, *supra*. After reviewing the evidence included in the claimant's appeal, we find that it does not constitute newly discovered evidence and that it would probably not produce a different result. We will not consider the evidence submitted for the first time on appeal.

Injury and disability are factual questions for the hearing officer to resolve. Conflicting evidence was presented on those issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolved the conflicts in the evidence and determines what facts have been established from the evidence presented. The hearing officer determined that the claimant did not sustain an injury while in the course and scope of his employment on _____, however she determined that the claimant had an injury to his back. Because the carrier waived the right to contest compensability, the claimant sustained a compensable injury. See Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). The hearing officer

determined that the claimant did not have disability and she commented that the claimant's testimony was not persuasive or credible on this disputed issue. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed as reformed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN MOUNTAIN
ACE/USA INSURANCE COMPANY
6600 EAST CAMPUS CIRCLE DRIVE, SUITE 200
IRVING, TEXAS 75063.**

Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Edward Vilano
Appeals Judge